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In the
Supreme Court of the United States

STATE OF FLORIDA,

PLAINTIFF,

v.

STATE OF GEORGIA,

DEFENDANT.

On Exceptions to the Report of the Special Master

AMICUS CURIAE BRIEF IN SUPPORT OF THE STATE OF GEORGIA BY THE ATLANTA REGIONAL COMMISSION DEKALB COUNTY, GEORGIA FORSYTH COUNTY, GEORGIA FULTON COUNTY, GEORGIA GWINNETT COUNTY, GEORGIA THE CITY OF ATLANTA, GEORGIA THE CITY OF GAINESVILLE, GEORGIA AND THE COBB COUNTY-MARIETTA WATER AUTHORITY

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Atlanta Regional Commission ("ARC") is a regional governmental entity composed of ten counties and the cities within them. As the Metropolitan Planning and Development Commission for Metropolitan Atlanta, ARC is responsible for coordinating and managing the planning, development, implementation, construction, management, and operation of regional water projects. It acts as the contracting and coordinating agent for local governments, and as the representative for local governments on matters related to reservoir and water supply operations by the United States Army Corps of Engineers (the "Corps").

The City of Atlanta, the City of Gainesville, DeKalb County, Fulton County, Forsyth County, and Gwinnett County are city and county governments in the Atlanta metropolitan area who use water from Lake Lanier and the Chattahoochee River for their public water supply. The Cobb County-Marietta Water Authority is a local government entity created by the Georgia General Assembly to provide water on a wholesale basis to Cobb County and its environs. It relies on the Chattahoochee River for approximately

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[1] The undersigned certify that counsel for a party did not author or pay for any part of this brief, and further that no person or entity other than the *Amici Curiae* made any monetary contribution to fund any part of the preparation or submission of this brief.

one-half of its water supply. Together, the *Amici Curiae* provide water from the Apalachicola-Chattahoochee-Flint ("ACF") River Basin to approximately 4 million residents and hundreds of thousands of businesses in Metropolitan Atlanta.

The *Amici Curiae* are all cities, counties, and political subdivisions of the State of Georgia, and the undersigned counsel are their authorized law officers for purposes of this case and controversy, including specifically the filing of this brief. Accordingly, no motion for leave is required under Rule 37.4.

STATEMENT OF THE CASE

Metropolitan Atlanta is the economic engine of the Southeast. According to the U.S. Census Bureau, it is the ninth most populous metropolitan statistical area in the United States and the fourth fastest growing in the nation.[2] It is home to approximately 5.8 million people; hundreds of thousands of businesses, including numerous Fortune 100 companies; major universities; military installations and defense contractors; and the world's busiest airport.[3]

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[2] U.S. Census Bureau, Estimates of Resident Population Change and Rankings, July 1, 2015 to July 1, 2016 – United States – Metropolitan Statistical Area; and for Puerto Rico, 2016 Population Estimates, http://bit.ly/2tQiV8m (last visited Aug. 6, 2017).

[3] *Id.*; Direct Testimony of Anna Kathryn Kirkpatrick, P.E. ("Kirkpatrick Direct") ¶¶ 9-12 (Dkt. #563).

Metropolitan Atlanta depends on the ACF Basin—in particular, Lake Lanier and the Chattahoochee River—as its primary water supply source. Direct Testimony of Peter Mayer, P.E. ("Mayer Direct") ¶¶ 24-25 (Dkt. #567). Of the 5.1 million Georgians who depend on the ACF Basin for water, almost 4.2 million reside in Metropolitan Atlanta, and the vast majority of these users have no other source of water supply. *Id.* ¶¶ 22-25.

Metropolitan Atlanta and the State of Georgia have taken substantial steps to conserve water and use more efficiently water withdrawn from the ACF Basin. These nationally-recognized efforts have been immensely successful.

In 2001, the Georgia General Assembly established the Metropolitan North Georgia Water Planning District (the "District" or "Metro Water District"), which is responsible for developing water supply and water conservation plans for the 15-county Metropolitan Atlanta area. *Id.* ¶ 54.[4] These plans, which have been revised and strengthened over the years, impose mandatory conservation and efficiency measures that must be implemented by the numerous water utilities under the District's jurisdiction. *Id.* ¶¶ 55-57; Kirkpatrick Direct ¶¶ 17-21. The requirements implemented through these plans have been recognized as "some of the most

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[4] The District is a State agency. It is staffed by Atlanta Regional Commission personnel, but the District and ARC are separate entities controlled by different boards.

significant and comprehensive water efficiency and conservation requirements in the United States." Mayer Direct ¶ 67. As a result of the District's work, per capita water withdrawals in Metropolitan Atlanta declined by 36.7%, from 155 gallons per capita per day ("gpcd") in 2000 to 98 gpcd in 2013—a level that, according to Florida's own expert, demonstrates that "'water conservation measures are being appropriately implemented.'" *Id.* ¶¶ 8, 43-50, Figures 7 & 8 (quoting Dracup Dep. 132:12-18); Tr. 3536 (Mayer).

Georgia and Metropolitan Atlanta have invested heavily in measures to reduce the amount of water lost from the municipal distribution systems that stretch across thousands of miles of underground mains and pipes in the Atlanta area. Georgia is a "national leader in water loss control and leak abatement," Tr. 3541 (Mayer), having "developed and implemented a nationally recognized water loss control program for public water systems across the state," Mayer Direct ¶ 9. In fact, "Georgia is one of just five states or regulatory entities in the United States to require water loss control measures on this scale," and "Georgia's programs far exceed any similar efforts in Florida." *Id.* ¶¶ 9, 64. The American Water Works Association—the Nation's leading organization of water professionals—has recognized Georgia as a national leader in this respect, specifically lauding its "'very comprehensive approach'" and its "'Water Loss Control Program Successes.'" *Id.* ¶ 63 (quoting American Water Works Assoc., 2016 Manual of Water Supply Practices–M36

Water Audits and Loss Control Programs, GX-847 at 22).

Water systems in Georgia have also devoted significant resources to addressing water loss. For instance, the City of Atlanta, which Florida's expert Dr. Sunding criticizes for its "old pipelines," repaired more than 10,000 leaks from 2012 to 2015, while allocating more than $55 million for distribution system rehabilitation and repair projects that will improve system reliability and decrease water loss. Mayer Direct ¶ 65. In the broader Metro Water District, between 2009 and 2014, water systems identified and repaired more than 42,000 leaks. *Id.*; Kirkpatrick Direct ¶ 22. Overall, these leak detection programs "far outpace those of Florida." Mayer Direct ¶ 64.

Further, more than 70% of the water withdrawn for use in the Metro Water District is reclaimed and returned to lakes, rivers, and streams within the ACF Basin. *Id.* ¶ 34. In other words, for every 100 gallons withdrawn by Metropolitan Atlanta utilities, 70 gallons are returned to the ACF Basin in the form of clean, high quality water for use downstream. By investing heavily in projects to return water to the ACF Basin after use, water utilities can expand water supplies and reduce impacts of water use by maximizing the benefits provided by existing infrastructure. *Id.* ¶ 74-76. Indeed, Gwinnett County, which is just one county in Metropolitan Atlanta, has alone spent more than $1 billion to construct and operate the F. Wayne Hill Water Resources Center, a state-of-the-art facility to return reclaimed water to

Lake Lanier for reuse. *Id.* ¶ 75. This facility alone is currently permitted by the State of Georgia to return 40 million gallons of water per day to Lake Lanier, and this amount is projected to increase to 60 million gallons per day by 2050. *Id.*

The overall effect of these programs has been dramatic. From 1994 to 2013, the population within Georgia served by ACF Basin water has increased by more than 1.6 million people. *Id.* ¶¶ 7, 30; Tr. 3531 (Mayer). And yet, as a result of the dramatic reductions in per capita withdrawals and substantial investments in returning water to the basin, described above, less water is being consumed today than in 1994. Mayer Direct ¶ 7. Driven by gains in Metropolitan Atlanta, municipal and industrial consumptive water use from the ACF Basin in Georgia declined by a remarkable 55 percent between 2000 and 2013, while total water withdrawals in Metropolitan Atlanta declined by 10 percent during the same period. *Id.* ¶¶ 35-36; Kirkpatrick Direct ¶ 26.

SUMMARY OF THE ARGUMENT

The Special Master is correct that Florida incontrovertibly bears the burden to prove by clear and convincing evidence that the remedy Florida requested would provide equitable redress. Because Florida failed to carry its burden on that point, its request for relief should be denied.

Florida asserts that the Special Master erred by requiring Florida to prove that a decree limiting Georgia's water use would remedy the harms it has

alleged. Florida's basic argument that the Court should reject the Special Master's Report because "equity will not suffer a wrong without a remedy," Exceptions 53, is misplaced. In a suit between two riparian jurisdictions, it is impossible to prove that one has suffered an "injury" or "wrong" due to "unreasonable" water use if one cannot show that a decree limiting the contested use would remedy the alleged harm. Because these elements are all intertwined, Florida would bear the burden to prove that an equitable remedy exists, even if its burden were limited (as Florida claims) to showing that it has been "injured" by Georgia's unreasonable water use.

Florida challenged two basic water uses in this case: municipal and industrial water use in Metropolitan Atlanta and agricultural water use in Southwest Georgia. In neither region would the damage inflicted on Georgia be remotely justified by the benefits of a consumption cap.

Cognizant of the weakness of its case, Florida asserts that its only burden was to prove that it has suffered "harm" resulting from a lack of water. But this argument is based on a misreading of *Colorado v. New Mexico*, 459 U.S. 176 (1982), which does not apply. The State of Colorado bore the burden of proof in *Colorado v. New Mexico* because the project it was asking the Supreme Court to authorize had already been adjudged to be unlawful based on the principle of prior appropriation, which both States followed.

Whichever State bears the burden of proof, the Court's past cases show that the equities *always* weigh heavily in favor of protecting existing users and providing water to existing economies. In fact, the Court has never entered a decree in an equitable apportionment case imposing any limit on an existing user, except as necessary to protect other existing users with vested rights and/or to supply water to an established economy.

To the extent Florida alleges injury to vague and abstract interests such as the "ecology" or "ecosystems" of the Apalachicola River and Bay, the Court should consider whether these claims are even justiciable. No manageable standards exist to quantify these alleged harms, let alone to determine how they compare to competing interests in Georgia. There might come a day when these types of claims are appropriate for judicial resolution; but before undertaking to strike this balance in the first instance, the Court should wait for a case in which the predicate scientific claims are clearly and fully proved, which here they are not.

ARGUMENT

I. The Special Master Correctly Required Florida to Prove by Clear and Convincing Evidence that a Decree Would Redress the Alleged Harm

The Special Master correctly concluded that Florida "incontrovertibly must bear the burden" to prove by clear and convincing evidence that a decree limiting Georgia's water use would redress the harm

Florida has alleged. Report 29 n.23. Based on the Special Master's holding that "Florida has not proven that its injury can be remedied" without a decree binding the Corps, *id.* at 31, Florida's request for relief should be denied.

Florida takes exception to the Special Master's conclusion that it was required to prove by clear and convincing evidence that the remedy it requested (a consumption cap) would provide equitable redress. Exception #2.b. Florida stakes much of its argument on the false premise that it is entitled to a remedy because "injury" has been established. Indeed, the thrust of Florida's entire brief is that "equity will not suffer a wrong without a remedy." Exceptions 53. This argument is misplaced given the nature of its claims.

As explained below, elements of liability, causation, and redressability are inseparable in a suit between riparians to curtail an allegedly unreasonable water use. It is impossible to prove that one has suffered an "injury" or "wrong" due to "unreasonable" water use if one cannot show that a decree limiting the contested use would remedy the alleged harm. Therefore, Florida would bear the burden to prove by clear and convincing evidence that an equitable remedy exists, even if its burden were limited (as Florida claims) to showing that it has been "injured" by Georgia's allegedly "unreasonable" water use.

A. The Special Master Did Not Find—and Florida Failed to Prove—that Florida Has Been "Injured" by Georgia's Water Use

Florida admits that "a State seeking to enjoin another State's 'invasion of rights' ... bears the burden of showing by clear and convincing evidence that it has been *injured*." Exceptions 34 (emphasis in original). "Injury," however, refers not just to "harm," but to harm *caused by* an "invasion of rights." *See* Restatement (Second) of Torts § 7 ("The word 'injury' is used ... to denote the fact that there has been an invasion of a legally protected interest...."); *see also New York v. New Jersey*, 256 U.S. 296, 309 (1921) (stating the complainant State must establish an "invasion of rights" by "clear and convincing evidence"); *Washington v. Oregon*, 297 U.S. 517, 522 (1936) (same).

Florida asserts that the Special Master made a finding that Florida has been injured, Exceptions 1, but he did not. The Special Master stated only that "Florida points to real harm," Report 31, without opining whether Georgia's water use, or some other factor such as extended regional droughts, had caused it. In fact, the Special Master expressly stated that "[m]uch more . . . would need to be said" about causation if the case could not be resolved on other grounds. *Id.* at 34.

Although the Special Master did not discuss this, Florida's failure to prove redressability *also* precludes a finding that Florida has been "injured" by "unreasonable" water use. This follows from the

"reasonable use" version of riparian rights that both Florida and Georgia follow. Report 30. There is no invasion of a riparian right unless the contested water use is "unreasonable."[5] But, "[i]f one water use causes no serious harm to another[,] it cannot be said to be unreasonable." Restatement (Second) of Torts § 850A; 93 C.J.S. Waters § 14 ("Any injury to a lower riparian owner incidental to the reasonable use of the stream by a higher riparian owner gives no right of redress, and a riparian owner who is not injured by the use may not interfere with it."). And if a decree limiting the contested use would not remedy the alleged harm, the contested use also cannot be said to have caused it. *See Paroline v. United States*, 134 S. Ct. 1710, 1722 (2014) (noting that the traditional way to prove that one thing caused another is to prove that the latter would not have occurred "but for" the former).

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[5] The original common law version of riparian rights emphasized downstream riparians' right to receive the "natural flow" of a water body over the upstream riparians' right to "reasonable use." In the modern version of riparian rights, however, the "primary interest" that is protected is the right "to make a reasonable use of the water," as distinguished from the right to receive natural flow. Restatement (Second) of Torts § 850(b). Both Georgia and Florida long ago abandoned the "natural flow" theory in favor of "reasonable use" as the basis of water allocation decisions. Fla. Stat. § 373.223 (adopting "reasonable-beneficial use" as the test for granting new permits); Ga. Comp. R. & Regs. R. 391-3-6-.07(8) (permits to be granted to meet "reasonable needs" provided the use will not cause "unreasonable adverse" effects).

It follows that Florida could not carry its burden on any element of its case—that Georgia's water use has caused harm to Florida, that Florida has been injured by Georgia's water use, or that Georgia's water use is "unreasonable"—if it cannot prove that an order limiting Georgia's water use will provide redress. Accordingly, the Special Master correctly concluded that Florida bore the burden of proof on redressability in particular.

B. Proof that a Decree Is Justified Requires Proof that It Will Provide Equitable Redress

Florida asserts that its burden to prove redressability should be reduced once "harm" has been established. In essence, Florida treats injury merely as a threshold requirement that must be proved, or not, before the Court will agree to hear a case, asserting that the "equation changes ... once this Court's jurisdiction is properly invoked." Exceptions 35. To the contrary, this Court has always required proof by clear and convincing evidence that any remedy is warranted before exercising its power, not just to entertain a claim, but especially "to control the conduct of one state at the suit of another." *Washington*, 297 U.S. at 523; *New York*, 256 U.S. at 309; *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

It is a fundamental requirement of equitable apportionment that the Court will not issue a decree to vindicate an "abstract" or "barren" right. *See*

Connecticut, 282 U.S. at 669; *Washington*, 297 U.S. at 523. This principle militates against limiting water use in Georgia, because any such decree would inflict great harm on Georgia without providing meaningful benefits to Florida.

In *Washington v. Oregon*, Washington sought to enjoin Oregon irrigators from diverting substantially all of the flow of an interstate stream during droughts. The Court denied the injunction based on evidence that most of the water would be lost to Washington even were it not diverted. 297 U.S. at 523. Under these facts, the Court found that an injunction limiting the diversion "would materially injure Oregon users without a compensating benefit to Washington users." *Id.* (internal quotes omitted).

The principle is also illustrated in *Nebraska v. Wyoming*, 325 U.S. 589, 619 (1945), where it was used, not to dismiss a case, but to refine a decree. The Court declined to cut off junior appropriators in one section of the basin in Colorado, despite finding that senior users in Nebraska were experiencing shortages. Due to transit losses (losses of water to evaporation and seepage within the canal), the Court found that it was "highly speculative whether the water would reach the Nebraska appropriator in time or whether the closing of the Colorado canal would work more hardship there than it would bestow benefits in Nebraska." *Id.* at 619.

Nebraska v. Wyoming also demonstrates that the Court has more options than just constructing a "mass allocation" between States. Wyoming had

advocated for a decree declaring how much water each State was entitled to take, an approach similar to the statewide consumption cap Florida requests. The Court, however, held that there was no "hard and fast rule" requiring it to proceed in that manner. *Id.* at 622. Instead, the Court divided the river into six sections corresponding to naturally defined reaches of the river, and it apportioned each separately. *See id.* at 620. This procedure allowed the Court to enter a decree reflecting the priority of appropriators and the balance of equities in each section—allowing it to preserve existing development and provide water to established economies in each section.

In this case, the specific harms that Florida has alleged relate to both the quantity and timing of flows in the Apalachicola River and discharges into Apalachicola Bay. Florida must prove by clear and convincing evidence, therefore, not only that a decree limiting water use in Georgia would send more water to Florida, but also that Florida would receive (1) enough additional water (2) at the times when it is needed (3) to produce substantial benefits related to the specific harms it has alleged (4) that outweigh the harms such a decree would inflict on Georgia. Because Florida failed to prove even the first step in this chain, the Special Master correctly recommends that its request for relief be denied.

II. Florida Failed to Prove that Limiting Georgia's Water Use Would Redress Any Injury or Otherwise Benefit Florida

Florida challenged two basic water uses in this case: municipal and industrial water use in Metropolitan Atlanta and agricultural water use in Southwest Georgia. Each is addressed separately below. In neither region would the benefits of a decree remotely justify the damage inflicted on Georgia.

A. Florida Has Abandoned Any Argument that Water Use in Metropolitan Atlanta Is Excessive or Causes Harm to Florida

The Special Master's Report devotes scant attention to municipal and industrial water use in Metropolitan Atlanta, as Florida all but abandoned its case against this sector and region. The Special Master discussed it in a single footnote, stating it is not "clear" that "Georgia's municipal and industrial water use is unreasonable," and specifically recognizing that, "Georgia appears to have taken significant steps to conserve water in the Atlanta metropolitan region." Report 34 n.28. Florida did not take exception to this. To the contrary, Florida acknowledges in its Exceptions that most of the water still "at issue" is the water withdrawn from "the Flint River and lower Chattahoochee Basins." Exceptions 38.

The Special Master's footnote—and Florida's tacit acceptance of it—reflect the difficulty Florida

experienced in trying to sustain its allegations against Metropolitan Atlanta. Because Metropolitan Atlanta accesses water from a small corner of the basin (representing only about 6 percent of its land area), most of the water in the ACF Basin enters below, and therefore is not affected by, Metropolitan Atlanta. *See* JX-124 at 2-24, Table 2.1-3. Further, because Metropolitan Atlanta only withdraws a small portion of the water in this part of the basin and further returns 70 percent of the water it withdraws, it reduces stream flow at the Georgia-Florida line by only a tiny fraction. Mayer Direct ¶¶ 41-42 & Figure 6. Not surprisingly, therefore, the evidence at trial showed that a decree limiting water use in Metropolitan Atlanta would inflict great harm to achieve little, if any, benefit downstream in Florida. *Id.* ¶¶ 41-42, 126-133, Figures 6 & 11; Tr. 3544-46, 3548-56 (Mayer). Two independent studies by federal agencies—the Environmental Impact Statement ("EIS") prepared by the United States Army Corps of Engineers[6] and a Biological Opinion prepared by the

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[6] U.S. Army Corps of Engineers, Final Environmental Impact Statement, Update of the Water Control Manual for the ACF River Basin and a Water Supply Storage Assessment (Dec. 2016) ("Final EIS"), *available at* https://goo.gl/5kPcZD. The Draft EIS is in the record in this case. JX-124. In its *amicus* brief, the United States informed the Special Master that the Final EIS did not change the Corps' operations from those presented at trial under the Draft EIS in a manner material to the case. Special Master Report 35-36 n.29. The Special Master therefore relied on the Draft EIS and took judicial notice of the Final EIS as needed. *Id.* Accordingly, the *Amici* submit this Court can take note that the findings discussed in the Draft EIS were not changed in the Final EIS.

United States Fish and Wildlife Service[7]—confirm this point.

The EIS is of particular interest because it confirms that limiting Metropolitan Atlanta's water use would not benefit Florida no matter how the Corps operates its reservoirs. The EIS was prepared as part of an effort by the Corps to develop a new Master Manual for the Corps reservoirs on the Chattahoochee River. The purpose was to determine how the reservoirs should operate to balance all authorized purposes, including water supply as well as the protection of fish and wildlife.[8] The Corps examined the effects of widely divergent levels of consumptive use in Metropolitan Atlanta, which ranged from amounts that are far less than what is consumed today to increases in use reflecting Metropolitan Atlanta's projected water supply needs through 2050. The Corps found that even substantially increased consumptive water use in Metropolitan Atlanta would have "negligible" effects on Florida, resulting in "little change in flow conditions in the Apalachicola River downstream of

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[7] U.S. Fish & Wildlife Service Biological Opinion on the U.S. Army Corps of Engineers Update of the Water Control Manual for the ACF Basin (2016), JX-168.

[8] Final EIS, *supra* note 6, at ES-2 ("[T]he purpose and need for the federal action is to determine how USACE projects in the ACF Basin should be operated for their authorized purposes, in light of current conditions and applicable law, and to implement those operations through updated water control plans and manuals."); *see* JX-124 at ES-4 (Draft EIS purpose and need statement).

Jim Woodruff Lock and Dam," and "no incremental effect on freshwater inflows to Apalachicola Bay." Final EIS at 6-93, 6-98.[9]

The Fish and Wildlife Service reached the same conclusion in the Biological Opinion released on October 6, 2016. JX-168. Based on its own independent review, the Service concluded that any impacts to threatened and endangered species in the Apalachicola River would be the result of the Corps' reservoir operations, as distinguished from consumptive uses of water in Metropolitan Atlanta.[10]

B. Florida Failed to Prove that Limiting Georgia's Water Use Would Benefit Florida

Florida also failed to prove that water use should be limited in Southwest Georgia. The Special Master correctly concluded that "Florida has not proven by clear and convincing evidence that any additional streamflow in the Flint River or in the Chattahoochee River would be released from Jim Woodruff Dam into the Apalachicola River at a time

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[9] *See* JX-124 at 6-71 (flow conditions below Jim Woodruff Lock and Dam for all alternatives), 6-75 (flow conditions below Jim Woodruff for the Proposed Action Alternative).

[10] JX-168 at 99 (Gulf sturgeon), 187 (mussels) ("To the extent the consumptive use assumptions are accurate, differences between the Baseline and the simulated flows of the [proposed Water Control Manual] are due to differences in reservoir operations.").

that would provide a material benefit to Florida." Report 47.

Rather than pointing to the evidence adduced at trial, Florida asks the Court to accept on faith that "[l]imiting consumptive uses *necessarily* increases basin inflow," Exceptions 47 (emphasis in original), thus producing "benefits" in the form of "higher minimum flows" that would "provide real redress," *id.* at 47-48. These vague assertions provide no basis for the Court to evaluate the benefits of a decree. "[F]ar from being established by clear and convincing evidence," the vague, speculative benefit that Florida alleges—like the alleged harm in *Connecticut v. Massachusetts*—"is not shown by evidence making it possible of computation or proving that it is large." *See Connecticut*, 282 U.S. at 666-67.

Much more information would be required to justify the damage that a decree limiting water use in Georgia would inflict. It is necessary to know not only that some additional water would in fact be delivered to Florida, but how much, and at what times. Only then would it be possible for this Court to determine if any water "saved" by a decree would be delivered to Florida in quantities and at times that would produce material benefits.

Furthermore, the potential benefits of a decree should be measured, not in gallons of water, but in real benefits to the people and ecosystems that Florida claims have been harmed. For example, to the extent Florida alleges that additional flow would improve conditions for oysters in Apalachicola Bay, it

was incumbent on Florida to prove that additional flow on the scale that could be produced by a decree will actually make a difference. By the reckoning of Florida's own expert, however, the most that could be hoped for by capping Georgia's consumption at a level far below what is being used today is an approximately 1.2 percent increase in oyster biomass. Direct Testimony of J. Wilson White, Ph.D. ¶¶ 152-53, Figures 14 & 15 (Dkt. 558); Tr. 4409-4411 (Lipcius); Tr. 1724-25 (White).

Florida's other evidence of "benefits" was equally uncompelling. For instance, Florida's own evidence showed that the draconian cap Florida requested would result in only trivial changes in Apalachicola Bay salinities—on the order of 1 part per thousand—under the very worst drought conditions in history. Direct Testimony of Marcia Greenblatt, Ph.D., P.E., at 32-33, 36, Figures 3-11, 3-12 & 3-15 (Dkt. 542). There would be no benefit at all in normal years. *Id.* at 34, 37, Figures 3-13 & 3-16.

And Florida's own ecological expert testified that the draconian water-use restrictions Florida seeks would benefit Tupelo trees in the Apalachicola River floodplain on just 29 days—total—over a 16-year period. Asked whether this would "have any impact at all on the population of tupelo ... trees in the Apalachicola," Florida's expert responded, "I don't know." Tr. 546 (Allan).

In short, the Special Master's conclusion that limiting Georgia's water use would provide no material benefit to Florida is consistent, not only

with every objective analysis that has ever been done, but with Florida's own evidence. Report 47. As Special Master explained, the evidence "tends to show that," even to the extent reducing Georgia's water use would result in "additional state-line flows," any benefits to Florida are "likely rare and unpredictable," Report 68. It would be a travesty to destroy Georgia's economy to achieve such trivial and uncertain benefits.

III. As Complainant, Florida Bears the Burden to Prove that Its Rights Have Been Invaded and that an Equitable Remedy Exists

Florida asserts that its only burden is to prove that it has suffered harm due to low flows, after which point the Court should divide the waters by balancing equities without any presumption in favor of either State or any specific outcome. Exceptions 35-36. This argument is based on a misinterpretation of *Colorado v. New Mexico* and a mistaken view that this Court should function, not as a judicial body adjudicating a concrete claim, but as a diplomatic alternative to armed conflict. Exceptions 54-55.

Without resolving the burden-shifting issue, the Special Master noted that it is "not altogether straightforward" to apply *Colorado v. New Mexico* to a dispute between two riparian jurisdictions. Report 29 n.23. The *Amici* thus offer the following analysis.

The two *Colorado v. New Mexico* decisions are best understood as outlining the limited role of equitable balancing in equitable apportionment cases. Notwithstanding broad *dicta* to the contrary, a

close reading of past equitable apportionment cases reveals that the Court has never employed equitable balancing in the open-ended manner Florida suggests—that is, without tilting the scale toward the *status quo* defined by the existing legal relations between the States.[11] The Court has used equitable balancing only in the sense of determining whether to enforce "paper" rights—that is, in deciding whether some water rights must fail "to the extent equity requires." *Washington*, 297 U.S. at 527. In this context, *Colorado v. New Mexico* establishes that equitable balancing can be invoked in equitable apportionment cases to create exceptions to the presumptive result supplied by local law, but only rarely, and only if the State seeking the exception can prove by clear and convincing evidence that such extraordinary relief is justified.

The key to *Colorado v. New Mexico* is that it was brought by the upstream state (Colorado) to authorize a diversion that had already been enjoined by a federal court applying principles of prior appropriation that both States followed. The dispute

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[11] *See, e.g.*, 2 Robert E. Clark, Waters And Water Rights, § 132.1 (1967) ("'Equitable apportionment,' however, is a label, not an analysis."); A. Dan Tarlock, Law Of Water Rights And Resources § 10:15 (July 2017 Update) (noting that, while the Court has always reserved the power to displace state law when considerations of equity require it, "among states with the same water law, the Court has applied the common water law of the party states. Thus, prior appropriation applies among appropriation states, pure or dual, and riparian rights applies among common law states").

was about the Vermejo River, which had been fully appropriated by long-established users in New Mexico. A private entity in Colorado sought to engineer a transmountain diversion to supply speculative industrial development. *Colorado v. New Mexico*, 459 U.S. 176, 178-79 (1982) ("*Colorado I*"). When a federal district court enjoined the proposed diversion, Colorado sued New Mexico seeking an equitable apportionment. *Id.*

In the first of two opinions, the Court affirmed its power to overturn the presumptive result under local law by undertaking an "equitable balancing" of benefits and harms. Over strong objections expressed by Justice O'Connor in a concurring opinion, the Court held that an out-of-priority diversion might theoretically be allowed if Colorado could prove: (1) that New Mexico could mitigate the harm to prior appropriators in New Mexico caused by Colorado's proposed diversion by adopting reasonable conservation measures, and (2) that any remaining harm to New Mexico would be more than offset by benefits to Colorado. In her concurrence, a troubled Justice O'Connor wrote that, by even admitting the possibility that such factors could be considered, the Court had gone "dangerously far toward accepting [the] suggestion . . . that it is appropriate in equitable apportionment litigation to weigh the harms and benefits to competing States." *Id.* at 193 (O'Connor, J. concurring). Justice O'Connor noted that past Courts had engaged in this type of balancing only in the rarest of cases:

> [T]his Court has never undertaken that balancing task outside the concrete context of either two established economies in the competing States dependent upon the waters to be apportioned or of a proposed diversion in one State to satisfy a demonstrable need for a potable supply of drinking water. In the former context, the Court may assess the relative benefit and detriment by reference to the actual fruits of use of the waters in the respective States. In the latter context, the compelling nature of the proposed use reduces the speculation that might otherwise attend assessment of the benefits of a proposed diversion. Where, as here, however, no existing economy in Colorado depends on the waters of the Vermejo and the actual uses in New Mexico rank in equal importance with the proposed uses in Colorado, the difficulty of arriving at the proper balance is especially great.

Id.

The Court then remanded the case to the Special Master for additional fact-finding. When it returned, Justice O'Connor wrote for the 8-1 majority, which found that Colorado had failed to prove that the

equities favored granting an exception to the rule of priority. *Colorado v. New Mexico*, 467 U.S. 310 (1984) ("*Colorado II*"). Justice O'Connor emphasized that, like all other facts in an equitable apportionment proceeding, the factors weighed in the equitable balance must be proved by "clear and convincing evidence." *Id.* at 315-16. Justice O'Connor then explained that this standard requires the party with the burden to inspire in the factfinder "an abiding conviction that the truth of its factual contentions are [sic] highly probable." *Id.* at 316 (internal quotes omitted). This demanding standard will be satisfied only if the proof "*instantly* tilt[s] the evidentiary scales in the affirmative when weighed against the evidence . . . offered in opposition." *Id.* (emphasis added).

Together, the two decisions in *Colorado v. New Mexico* establish that the State seeking to use equitable balancing to enjoin a use that would be allowed under local law, or to allow a use that would be prohibited under local law, bears an especially heavy burden to prove that an exception to the locally accepted rule should be granted. This ensures that the State seeking such extraordinary relief "bear[s] most, though not all, of the risks of an erroneous decision." *Colorado II*, 467 U.S. at 316.[12]

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[12] *See* A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated and Restated*, 56 U. Colo. L. Rev. 381, 407 (1985).

Occasions to invoke the burden-shifting framework of *Colorado v. New Mexico* will be rare in cases between riparian States. In contrast to appropriative rights, which are pre-quantified, the scope of the riparian right—what is "reasonable"—can only be determined by balancing benefits and harms.[13] In *Colorado v. New Mexico*, the legal relationship between the parties—the fact that New Mexico had a pre-existing legal right to all of the water Colorado sought to take—had been established conclusively before Colorado even filed suit. As the State seeking to disrupt the legal *status quo*, Colorado appropriately bore a heavy burden of proof. That pattern will rarely repeat itself in suits between riparian jurisdictions.

Any exceptions would likely involve water uses considered unreasonable *per se* in riparian states. For example, the original common law version of riparian rights prohibited all interbasin transfers of water as a matter of law. Neither Florida nor Georgia follows this rule;[14] but in states that do, interbasin transfers

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[13] 1-7 Amy Kelley & Robert Beck, Waters And Water Rights § 7.02 ("Reasonable use theory almost necessarily requires courts to compare the benefit of one use against the benefit of another, incompatible use, to determine which use is reasonable.... Basically, courts will decide whether a use is reasonable by comparing the economic and social cost to the plaintiff caused by the defendant's conduct to the economic and social cost to the defendant of modifying the defendant's conduct to accommodate the plaintiff's use.")

[14] Like other regulated riparian jurisdictions, Georgia and Florida abandoned the prohibition against interbasin transfers

can be enjoined based on nominal damages, without any showing of harm.[15] In a case between two States that both followed that rule, the burden-shifting framework of *Colorado v. New Mexico* might be invoked to authorize an interbasin transfer that would be prohibited under the accepted local rule.

This is precisely what happened in *New Jersey v. New York*, 283 U.S. 336 (1931), in which New York proposed to construct a major new project to transport water from the Delaware River Basin to the Hudson River Basin to supply New York City. New Jersey had a clear right to enjoin New York's proposed diversion under the common law rule that both States followed.[16] New York was thus in the position of Colorado in *Colorado v. New Mexico*, which would require it to prove by clear and convincing evidence that an exception to the local prohibition was warranted. Although the Court did not explain its decision in these terms, the analysis presented above does explain the result. The Court declared that it would not enforce a "strict

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long ago. *See* Fla. Stat. § 373.223(2) (authorizing interbasin transfers); O.C.G.A. § 12-5-31(n) (same).

[15] *See, e.g., Parker v. Griswold*, 17 Conn. 288 (1846) (holding a riparian landowner can maintain an action against an out-of-basin water use without proving actual damage).

[16] *See, e.g.*, Report of the Special Master, *New Jersey v. New York*, Orig. No. 16 (Oct. Term 1930), 283 U.S. Sup. Ct. Records and Briefs Part 7, at 21 ("Special Master's Report") ("[I]f the strict rule of common law is . . . applicable, it must necessarily follow that New Jersey is entitled to an injunction....").

application" of the local law because the transfer was needed to serve the "high public purpose" of providing drinking water to a major city that needed it.[17]

The Court did limit the proposed diversion for New York City, allowing New York to take only 75 percent of the water it originally sought. This is not surprising, given that New York bore the burden to justify its use, as explained above. Furthermore, the Court allowed New York to take the vast majority of the water it sought, which was enough to satisfy substantial future needs. The decree thus reflects the limit of the Court's willingness to authorize a use prohibited by local law to satisfy speculative, distant future needs—an issue that is not presented in this case. In addition, the Court issued an "open decree" allowing the parties to seek modifications in the future, if necessary; and the Court subsequently modified the 1931 decree in 1954 to allow an even larger diversion than New York had originally requested. *New Jersey v. New York*, 347 U.S. 995 (1954).

In this case, in contrast to both *New Jersey v. New York* and Colorado *v. New Mexico*, Florida does not allege that Georgia's water is unreasonable *per se*, and there is no other basis for Florida to claim

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[17] *See id.* at 39 (finding the proposed diversion to be "for a reasonable purpose and, indeed, a high public purpose"); *see also Connecticut*, 282 U.S. at 673 ("Drinking and other domestic purposes are the highest uses of water.").

that Georgia's use is presumptively unlawful. Therefore, *Colorado v. New Mexico* does not apply, and Florida cannot be relieved of its burden as the complainant to prove the elements of its claim—including that an "invasion of rights" has occurred, as well as the availability of equitable redress. *New York*, 256 U.S. at 309; *Connecticut*, 282 U.S. at 669; *Washington*, 297 U.S. at 524. *See also Colorado v. Kansas*, 320 U.S. 383, 391 (1943) (rejecting Colorado's argument that the Court's dismissal of *Kansas v. Colorado* in 1906 amounted to an allocation of the river, stating that Kansas "labored under a burden of proof applicable in litigation between quasi-sovereign states.").

IV. The Court Has Used Equitable Balancing to Alter the Legal Status Quo Only to Protect Established Users and Existing Economies

Whichever State bears the burden of proof, the Court's past cases show that the equities *always* weigh heavily in favor of protecting existing users and providing water to existing economies. In fact, in the limited universe of equitable apportionment cases, the Court has never entered a decree imposing any limit on an existing user, except as necessary to protect other existing users with vested rights and/or to supply water to an established economy.

The Court first recognized its power to apportion interstate waters as a matter of federal common law in *Kansas v. Colorado*, 206 U.S. 46 (1907). A special federal rule of decision was needed in that case because the two States had developed different water laws reflecting starkly different policy preferences.

Kansas, the downstream state, was at that time a common law riparian state. Based on its own riparian law, Kansas asserted it was entitled to receive the natural flow of the Arkansas River "undiminished" in quantity or quality.[18] Kansas further asserted that it was entitled to an injunction to prevent Colorado from diverting any water from the river and thus interfering with its natural flow. Colorado, in contrast, pioneered the law of "prior appropriation," which is now followed in most Western states. Prior appropriation emphasizes the right to appropriate water for beneficial uses by giving the first person to do so a right superior to subsequent users. Consistent with this doctrine, Colorado claimed that it was entitled to appropriate the entire Arkansas River to the extent it could use the water beneficially. *Id.* at 98.

The Court rejected both extreme theories on grounds that neither state could impose its policy preference on the other. It concluded that its role was "to settle [the] dispute in such a way as will recognize the equal rights of both [states] and at the same time do justice between them." *Id.* The Court then ruled for Colorado. It agreed that Colorado had caused "perceptible injury"—as the flow of the river had indeed been diminished to Kansas's detriment—but it held that the injury to Kansas was outweighed by "the great benefit" inuring to Colorado. *Id.* at 117, 114. It thus dismissed the case without prejudice,

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[18] As discussed above, *supra* note 5, neither Florida nor Georgia adheres to this rule.

instructing Kansas that it could file again if Colorado's uses grew to the point that "substantial interests" of Kansas were being injured "to the extent of destroying the equitable apportionment of benefits . . . resulting from the flow of the river." *Id.* at 118.

Notwithstanding the broad principles announced in *Kansas v. Colorado*, the Court retreated from equitable balancing in subsequent cases between States that follow the same law. The Court discussed this issue at great length in *Wyoming v. Colorado*, 259 U.S. 419 (1922), in which Wyoming sought to prevent Colorado from constructing a tunnel to divert water from the Laramie River to reclaim arid Colorado lands. *Id.* at 490. Both States followed the doctrine of prior appropriation. Wyoming argued the proposed diversion would infringe vested water rights, while Colorado argued that its out-of-priority diversion should be allowed because it could "accomplish more with the water than Wyoming does or can." *Id.* at 468. The Court rejected Colorado's argument. Because both States followed the rule of priority, the Court held that the local rule "furnishe[d] the only basis . . . consonant with the principles of right and equity" on which the controversy could be decided. *Id.* at 470.

The next two cases—*Connecticut v. Massachusetts*, 282 U.S. 660 (1931), and *New Jersey v. New York*, 283 U.S. 336 (1931)—are the two most important exceptions to the Court's usual adherence to State water law. As explained above, the Court in both cases allowed large interbasin transfers that would have been prohibited under the law of both

States, justifying this result based on the "high public purpose" of supplying water to a major city that needed it.[19] It was in this context that Justice Holmes famously declared that the aim of equitable apportionment "always is to secure an equitable apportionment without quibbling over formulas." *New Jersey*, 283 U.S. at 343.

Finally, the last equitable apportionment decree was entered in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Again, the Court determined that the water allocation rule followed by both States would effectuate the most equitable apportionment. The Court thus fashioned a decree based on the priority of appropriators in each of six different sections. The decree is notable, not only for its fidelity to the principles of prior appropriation in the main, but also for the one limited exception to this general rule. In one of the six sections, the Court declined to enjoin substantial out-of-priority diversions in Colorado that were already the basis of a thriving local economy. The Court explained:

> Strict application of the priority rule might well result in placing a limitation on Colorado's present use for the benefit of [Nebraska]. But as we have said, priority of appropriation, while the guiding principle for an apportionment, is not a hard and fast rule. Colorado's

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[19] *See, e.g., supra* note 17.

> countervailing equities indicate it should not be strictly adhered to in this situation.

Id. at 622.

Nebraska v. Wyoming is consistent with the Court's general pattern of adhering to local law and departing from it only when necessary to protect existing users or provide additional water to established economies. When viewed against this history, Florida's claims are truly extraordinary.

V. If Florida's Claims Alleging Environmental Harm Are Even Justiciable, They Should Be Subject to a Heightened Standard of Proof

To the extent Florida alleges injury to vague and abstract interests such as the "ecology" or "ecosystems" of the Apalachicola River and Bay, the Court should consider whether these claims are even justiciable. Without discounting the importance of these interests, the Court should recognize that no standards exist to determine how they should be valued and prioritized in relation to competing economic interests in Georgia. To the extent Congress has addressed these issues, its conclusions are embodied in federal statutes that Florida evidently believes do not go far enough. But, as the very limits of the federal statutes make clear, no standards exist to guide the Court in determining how much further to go.

In *Vieth v. Jubelirer*, the Court emphasized that the "judicial power" under Article III "is not whatever

judges choose to do . . . [but] the power to act in the manner traditional for English and American courts." 541 U.S. 267, 277-78 (2004). "That 'traditional role' involves the application of some manageable and cognizable standard within the competence of the Judiciary to ascertain and employ to the facts of a concrete case." *Zivotofsky v. Clinton*, 566 U.S. 189, 203-04 (2012) (Sotomayor, J., concurring). "When a court is given no standard by which to adjudicate a dispute, or cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a political branch, resolution of the suit is beyond the judicial role envisioned by Article III." *Id.*

No generally accepted standards exist to quantify the interests Florida asserts, much less determine how they compare to competing interests in Georgia. How much harm Georgia should have to bear to "help[] the Apalachicola ecosystems rejuvenate," Exceptions 51, or to ensure that Florida's "iconic Tupelo tree" maintains its dominance in the forest? And how is the Court to evaluate the alleged benefit of Florida's proposed water-use restrictions, which, according to its own ecological expert, would provide additional water for these trees on just 29 days over 16 years (less than 2 days per year)? The balance between preserving natural areas and making productive use of natural resources is an issue that all states confront. The balance has been struck in different ways in different places. Every major city was once a wilderness, and every so-called wilderness has been changed and affected by humans. How much change is too much—and whether any given change should be considered

good or bad—are policy questions as to which no consensus exists. These are questions that cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The difficulties described by Justice O'Connor in her concurrence in *Colorado I* pale by comparison to this case. *See* 459 U.S. at 193. The competing uses of the Vermejo River that troubled Justice O'Connor were at least competing economic interests. Florida's case, in contrast, pits traditional domestic and agricultural demands in Georgia against the unquantified and poorly understood demands of "ecosystems" and "ecological processes." These interests are difficult to quantify and virtually impossible to value and weigh against competing interests in Georgia.

The policy choices become even murkier when one considers the impacts to the Apalachicola River and Bay that Florida has not only allowed but in many cases encouraged. The State of Florida urged and supported the development of "Sikes Cut," a navigation cut through St. George Island that allows salty Gulf waters into the bay. The native sturgeon population in the Apalachicola River was almost eliminated in the 20th century by the combined effects of severe overfishing perpetrated by a commercial fishery at the Port of Apalachicola, Florida, and the construction of dams that block access to historic sturgeon spawning grounds in the Chattahoochee River. *See* 2016 Biological Opinion. JX-168 at 62. Tate's Hell Swamp, a major tributary

to Apalachicola Bay located entirely within Florida, has been ditched and drained and converted to pine plantations. *See* Direct Testimony of Charles Menzie, Ph.D. ¶¶ 183-85 (Dkt. #569). The list goes on. The point is not that any of these impacts is unacceptable, but that it would be entirely arbitrary to declare them permissible while at the same time declaring that any impacts caused by Georgia's activities are not.

If it will ever be appropriate for this Court to strike that balance, the Court should wait for a case in which the scientific and factual claims are "clearly and fully proved." *See Missouri*, 200 U.S. at 521. Only then can the Court be certain that the "principle to be applied [is] one which the [C]ourt is prepared deliberately to maintain against all considerations on the other side." *Id.*

CONCLUSION

In sum, Florida bears the burden to prove all elements of its claim against Georgia by clear and convincing evidence, including the availability of equitable redress. Florida has failed to prove that a decree limiting Georgia's consumptive uses of water would increase the state-line flows at all, let alone to show that enough additional water would be produced at the right times to have any material effect on the complex ecological harms Florida has asserted. Accordingly, Florida's request for relief should be denied.

Respectfully submitted,

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